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IN THE

SUPREME COURT OF THE UNITED STATES

75-125

Richard J. Getty ..... Petitioner

vs.

Commonwealth of Kentucky, Ex Rel
Kentucky Bar Association ..... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

Richard J. Getty ..... **Petitioner**

vs.

Commonwealth of Kentucky, Ex Rel
Kentucky Bar Association ..... **Respondent**

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner prays that a Writ of Certiorari issue to review the Judgment herein of the Court of Appeals of Kentucky entered upon the 17th day of January, 1975; Petition for rehearing filed February 13, 1975; denied April 25, 1975.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals of Kentucky has not yet been reported and is printed in Appendix B, pp. 17a-27a.

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JURISDICTION

The Judgment of the Court of Appeals of Kentucky was entered on January 17, 1975, Appendix B, pp. 17a-27a. A Petition for Rehearing was filed on February 13, 1975. It was denied on April 25, 1975, Appendix B, p. 16a. A mandate was issued on April 28, 1975, Appendix B, p. 15a, suspending the Petitioner from the practice of law in the Commonwealth of Kentucky for a period of one month. A "corrected" copy was issued May 6, 1975, changing the period of suspension from one to six months. Appendix B, pp. 12a-13a.

On motion of the Respondent a stay of execution and enforcement of the mandate of the Court of Appeals was granted on May 2, 1975, for a period to and including August 29, 1975, in order that the Respondent might make application to the Supreme Court of the United States for a Writ of Certiorari. It was further ordered that any additional requests for any stay being necessary should be addressed to the Supreme Court of the United States. Appendix B, pp. 13a-14a.

The jurisdiction of this Court invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Is an attorney deprived of due process of law and equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution of these United States of America when a State Court of last resort substitutes its own opinion as to the credibility of conflicting witnesses, which opinion is solely based upon a written transcript, for that of the Trier of Fact, and, without giving the accused a hearing before it on the controverted matters, suspends him from the practice of law?

2. Does the lack of any standards or procedural safeguards in Kentucky Revised Statute 30.170, granting the Court of Appeals the authority to regulate the practice of law, make its effects so uncertain as to deny attorneys due process of law and equal protection of the laws under the Fifth and Fourteenth Amendments to the Constitution of these United States of America, as well as permitting the Court of Appeals to enact rules susceptible of sweeping and improper application limiting First Amendment freedoms?

3. Was the suspension of the Petitioner so lacking of a rational basis in the evidence as to be arbitrary and discriminatory and thus a denial to him of due process of law and equal protection of the laws?

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4. Does the imposition of all the costs of a disciplinary proceeding, amounting to over $2,000.00, upon an attorney acquitted of all charges by the Trier of Fact, found innocent of nine out of ten charges by the Board of Governors of the Bar Association, and found innocent of six out of ten charges by the Court of last resort, deprive the accused of due process of law and equal protection of the law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C.A., Section 1257(3)

United States Constitution, Amendments I, V and XIV, Appendix, pp. 1a-2a.

Kentucky Revised Statute 30.170, Appendix A, pp. 2a-3a.

Rules of the Court of Appeals of Kentucky 3.130, 3.230, 3.330, 3.360, 3.370, 3.410, Appendix A, pp. 3a-10a.

STATEMENT OF THE CASE

On May 3, 1973, the Kentucky Bar Association made a complaint against Richard J. Getty, alleging unethical conduct on the part of Petitioner during the course of representing Lance Kohler on a

criminal charge in the Fayette County Circuit Court, Indictment Number 9150. This complaint contained six charges, denominated by the Trial Committee as charges I through VI during the hearing before it and in their report. Appendix B, pp. 33a-34a.

On August 2, 1973, an additional complaint was made against Getty. It consisted of four counts, denominated by the Trial Committee as counts VII through X, relating to Getty's conduct as defense counsel in the cases of *Commonwealth* vs. *Campbell*, Harrison County Court; *Commonwealth* vs. *Morgan*, Nicholas Circuit Court; and *Commonwealth* vs. *William Hilander, Jr.*, Nicholas County Court, Appendix B, pp. 34a-36a. Nicholas and Harrison Counties are in the same judicial district, having the same Circuit Judge and Commonwealth Attorney, and a close relationship between many of their public officials.

Richard J. Getty graduated from the College of Law at the University of Kentucky at Lexington in June, 1951. From July, 1951, to April, 1952, he practiced law in Lexington, Kentucky. He then moved to California where he worked or was self-employed as a claims adjuster until January, 1965. He then practiced law in Georgetown and Lexington, Kentucky, until September, 1966.

In September, 1966, he returned to California and re-entered the adjustment business. He resumed the practice of law in Kentucky in the summer of

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1971, when he undertook the Kohler case out of which Charge Number I, or Charges I-VI, as designated by the Trial Committee, arose.

At the time the Petitioner undertook the Kohler case he had actual experience in the practice of law of approximately thirty months. At the time he represented Earl Morgan in the Nicholas Circuit Court in October, 1973, he had actually been engaged in the practice of law for less than four years, although his age may have led people to believe that his experience was much greater. (T.C., Vol. X, pp. 865, 875).[1]

Lance Kohler came to trial in the Fayette Circuit on October 8, 1971, upon a felony charge. He was convicted. (T.C., Vol. I, p. 59). Getty took an appeal to the Court of Appeals of Kentucky which reversed the conviction. However, prior to that time, Kohler, who was imprisoned at LaGrange Penitentiary, became mad at Getty and filed an affidavit with the Court of Appeals seeking a change of counsel. It was denied.

Kohler's affidavit contained certain scurrilous charges against Getty whcih became the basis for

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1. The Transcript of Testimony in Commonwealth vs. Morgan will be designated herein as Morgan; the Transcript of Commonwealth vs. Hilander as Hilander; the Transcript of Commonwealth vs. Getty upon Appeal to the Harrison Circuit Court as Getty; and the Transcript of Hearings before the Trial Committee as T.C.

the six counts of the first complaint. The Trial Committee and the Board of Governors refused to believe them. The Court of Appeals denominated them as "Incredible", Appendix B, p. 21a.

While the Kohler charges were pending the Kentucky Bar Association, for reasons unknown to the Petitioner, solicited affidavits from County Judge Carl Nunnelley of Harrison County and John Keith, Harrison County Attorney; (T.C., Vol. VI, p. 468, q. 9; p. 476, q. 8-9); the Honorable John P. Lair, Judge of the Eighteenth Judicial District (T.C., Vol. VI, p. 570, q. 8-9); G. L. Tucker, Commonwealth Attorney of the Eighteenth Judicial District; Charles Cox, County Attorney of Nicholas County (T.C., Vol. VI, p. 638, q. 1-2; p. 639, q. 5) and Floyd Clark, County Judge of Nicholas County (T.C., Vol. VIII, p. 763). None of these gentlemen admitted to having made any complaint against Getty until asked for it.[2]

As a result of Kohler's slander and the affidavits solicited by the Kentucky Bar Association the two complaints were filed three months apart. They came on for hearing before a Committee composed of the Honorable Rodney S. Bryson, the Honorable Richard S. Nelson, and the Honorable Robert E. Wohlwender, all experienced and

2. The ten counts of the two complaints are set forth verbatum in the Report of the Trial Committee, Appendix B, pp. 32a-36a.

respected trial attorneys, on the 27th day of November, 1973. In sessions which lasted for three days, some times into the night, forty-two witnesses were heard by the tribunal. The transcript of the proceedings consists of one thousand forty-seven pages. In addition, as is shown by their remarks during the course of the hearings, the Trial Committee had read the sixteen hundred twenty-eight pages of the trial testimony in the Getty, Morgan, Hilander and Kohler proceedings, all of which were introduced into evidence.

Over one dozen affidavits from public officials and attorneys were filed in the record testifying to Kohler's bad reputation for truth and veracity and to Getty's good reputation for the same. A number of witnesses, including a Circuit Judge, a County Judge, two County Attorneys, a Police Judge, and various members of the Bar, testified before the Trial Committee to the same effect and to Getty's ordinary good behavior in court.

James J. Varellas, an attorney practicing in Fayette County, testified that at a time when Kohler was in jail on a non-support charge and Getty was still in California, Kohler had made the same remarks to him concerning Judge Mitchell Meade of the Fayette Circuit Court, that Getty was accused of fabricating in the Complaint.

The Trial Committee concluded that it did ". . . not believe Lance Kohler". Unbelieveably three of

the twelve members of the Board of Governors voted to convict Getty on these charges. However, the Court of Appeals itself deemed them "incredible".

The other four charges of the second complaint, denominated by the Trial Committee, as VII through X, and by the Court of Appeals as Counts I-IV of Charge II, produced widely varying and sometimes heated testimony. Not only were the witnesses for the Kentucky Bar Association contradicted by Getty and the witnesses appearing for him, but they impeached themselves and each other upon occasion.

In the Harrison County Court case styled *Commonwealth* vs. *Campbell,* the Petitioner was accused, during his representation of the Defendant, Campbell, at a trial on March 27, 1973, of calling County Attorney John M. Keith, a "damn liar" on two occasions out of the presence of the jury. He was also charged with disregarding instructions of the Court, badgering and harrassing a witness, and pointing his finger at the Court in a disrespectful and threatening manner.

The Court found Getty guilty of contempt and sentenced him to six hours in the Harrison County Jail. It was the transcript of Getty's appeal to the Harrison Circuit Court, which was heard by the Court sitting without a jury, which was stipulated into evidence before the Trial Committee by the Petitioner and the Kentucky Bar Association.

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The second charge of the second complaint accused Getty during his representation of the Defendant Morgan, on or about October 6, 1973, of being continually reprimanded by the Court for his arrogant, abusive attitude; for continually interrupting the Commonwealth Attorney in his presentation of the Commonwealth's case, of refusing to listen to objections made by the Commonwealth Attorney, of becoming abusive towards the Nicholas County Attorney, Charles Cox, and of harrassing and being abusive to the Commonwealth Attorney, G. L. Tucker.

The third charge of the second complaint stated that Getty during his representation of the Defendant, Hilander, at an examining trial in the Nicholas County Court, on December 11, 1972, attempted to disrupt the court proceedings which resulted in an admonishment from County Judge Floyd Clark concerning his decorum. He was also accused of becoming so abusive to State Police Detective Charles Seay in the County Judge's office, during a recess, that a physical fight nearly resulted.

The last charge of the second complaint concerned a dispute which allegedly took place between one Nancy R. Lyons, Secretary to Nicholas County Attorney, Charles Cox, over a transcript of testimony which Getty had engaged her to take at the examining trial in *Commonwealth* vs. *William*

Hilander, Jr., in the Nicholas County Court. Getty was charged with having accused Lyons of not having propertly transcribed her notes and of being influenced in her transcription by County Attorney Cox.

The Petitioner categorically denied all of the charges, except that he hired Mrs. Lyons and that she would not turn over the transcript until she was paid. He presented witnesses, present in the courtrooms in question upon the occasions mentioned in the charges, or produced testimony upon cross-examination from the witnesses for the Kentucky Bar Association, which established his innocence of any conduct calculated to bring the bench and bar into disrepute. R.C.A. 3.130, Appendix A, pp. 3a-4a. The evidence will be discussed in more detail under Reasons For Granting The Writ.

The Trial Committee concluded with regard to the Campbell trial incident that while Mr. Getty's conduct may have substantiated a contempt ruling, his actions were not so outrageous that he should be brought up on charges before the Bar Association. It ruled that the allegations contained in the second and third counts of the second charge, denominated as VIII and IX by the Trial Committee, were not supported by a preponderance of the evidence, and further, that the evidence heard pertaining to charge IX was extremely contradictory. As to the last

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count of the second charge the Trial Committee concluded that the allegations, even if they had been supported by a preponderance of the evidence, were not calculated to bring the bench and bar of Kentucky into disrepute, Appendix B, pp. 38a-49a.

Although the Court of Appeals refers to "Getty's Arguments on Appeal . . . in its opinion, Appendix B, 19a," he in fact took no appeal. The Trial Committee completely exonerated him. The Board of Governors had found him guilty of only part of count I of the second charge and had acquitted him on all the allegations made in the first complaint and in count II, III and IV of the second complaint. It recommended a suspension of one month.

No appeal is provided for under the Rules of the Court of Appeals. R.C.A. 3.410, Appendix A, pp. 9a-10a, provides that upon the making of a determination of guilt by the Board of Governors, the Court issues a rule to the accused to show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor. Twenty days is allowed for a response.

The Petitioner filed a response asserting that the Trial Committee had heard the evidence of the witnesses and concluded that the Kentucky Bar Association had failed to establish its case against Getty by a preponderance of the evidence and had recommended that the charges against him be

dismissed. The Petitioner argued that in construing R.C.A. 3.330, Appendix A, p. 6a, the Court of Appeals had determined that the criteria of proof required to support disciplinary action was a preponderance of the evidence. *Kentucky Bar Association* v. *Lewis,* Ky. 1955 282 S.W. 2d 321. Therefore, since the findings of the Trial Committee were supported by substantial evidence and were not clearly erroneous, they should be sustained.

The Petitioner argued that since the testimony was highly contradictory, since there was no agreement, even among witnesses for the Kentucky Bar Association, which could establish facts with sufficient certainty to be ruled upon as a matter of law; since the resolution of the variances in testimony depended upon the credibility of the witnesses, and since the Board of Governors had not heard or personally observed them it was not competent to override the Trial Committee. The Petitioner further maintained that the Board of Governors was not in a position, not having heard the evidence, to make a qualitative and subjective judgment as to what extent the testimony of the witnesses appearing against him might have been influenced by personal dislike arising out of conflict of personality. Therefore, he asserted that the action of the Board of Governors was arbitrary, capricious, discriminatory, unlawful, illegal and a denial of his rights.

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In his response the Petitioner also raised the question that the Board of Governors had not stated any reasons for disagreeing with the Trial Committee or made any separate findings. Getty maintained that due process, fairness and justice required that such should have been done.

The Petitioner also proposed that since the Board of Governors had only found him guilty of a portion of one out of ten charges it was unfair to assess the entire costs of the proceedings against him. He citèd the case of *Kentucky State Bar Association* v. *Taylor,* Ky. 1972, 482 S.W. 2d 574, where after finding that Mr. Taylor was guilty of approximately one-half of the charges the Court of Appeals held that he should only pay fifty percent of the costs.

At this point in the proceedings the Petitioner had taken no issue with the holding of the Court of Appeals that it was the final arbiter of the facts, as set forth in *Kentucky Bar Association* v. *Stivers,* Ky. 1972, 475 S.W. 2d 900. In that case there was little or no disagreement as to the facts and the main question was their legal effect. The issue of creditability was not involved.

The Petitioner believed that the Court of Appeals was stating in the Stivers' case that it would be the final judge of whether or not a fact was established by a preponderance of the evidence or that the conclusion of a lower hearing officer was

supported by substantial evidence. He did not understand it to mean that the Court was going to make a judgment of the credibility of witnesses, or the weight to be given to their testimony, solely from the transcribed page.

The Petitioner was stunned when the Court of Appeals released its opinion finding him guilty on all four counts of the second charge, denominated by the Trial Committee as VII through X. He filed a Petition for Rehearing in which it was stated in his argument.

> "I. The interpretation of the Court of its role as the 'ultimate arbiter' of the facts deprives the Respondent of his rights under the First, Second, Seventh, Eleventh, Fourteenth and Seventeenth sections of the Constitution of the Commonwealth of Kentucky and under the Fifth, Sixth, Seven and Fourteenth Amendments to the Constitution of these United States of America."

The opinion of the Court of Appeals states: "Getty was continually reprimanded by the Court for interrupting the Commonwealth's Attorney in the presentation of the Commonwealth's case." Appendix B, pp. 24a. This reference is to the case of *Commonwealth* v. *Morgan* in the Nicholas Circuit Court. The Transcript of Evidence in that case had been accepted by the Court of Appeals in a direct appeal of Morgan's conviction, had been stipulated

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into the evidence before the Trial Committee by the Kentucky Bar Association and Getty, was not impeached, and was ruled by the Trial Committee to be the best evidence of what occurred during the trial.[3]

The record shows only two occasions upon which Mr. Getty interrupted Mr. Tucker. On the first occasion Mr. Tucker, as explained by Mr. Rubel Williams, the foreman of the jury and present in the courtroom, had apparently finished his examination of a witness and Mr. Getty commenced his. When informed that Mr. Tucker was not in fact through he apologized. (Morgan, p. 81). On the only other occasion when the same thing happened he again apologized. (Morgan, p. 85). The only objection that he made during Mr. Tucker's closing argument was sustained. (Morgan, p. 149).

This testimony was transcribed by Mrs. Gayle McCarty, the official reporter of the Eighteenth Judicial District for many years. It shows that when the Commonwealth Attorney asked the Defendant's wife as to living together with him prior to their

3. Where the Court of Appeals and Board of Governors held no hearings of their own, the role of the Trial Committee is that of a Trier of Facts, and not that of a mere investigator whose action is merely advisory under R.C.A. 3.360 (d), Appendix B, pp. 7a-8a. Willner v. Committee on Character and Fitness, 373 U.S. 96, 102, 104, 83 S.Ct. 1175, 10 L.ed. 2d 224, 229, 230 (1963).

marriage, Mr. Getty objected, and the Court instructed the jury to disregard the question. (Morgan, p. 85, q. 4). The question was asked again of another witness by the Commonwealth Attorney a few minutes later despite the Court's admonition. (Morgan, p. 105-106, q. 25).

The record also shows that Getty addressed the Court courteously, for instance, "Thank you, your honor" (Morgan, p. 5); "I withdraw the objection" (Morgan p. 43, q. 13); "If your honor please, that is where I differ with the Court, with due respect to the Court. I seem to think . . ." (Morgan, p. 75-76); and "Sorry your honor". There are numerous instances of Mr. Getty's accepting of a ruling by the Court without argument, and no instance of disrespect to the Court. (Morgan, p. 21, q. 40-41; p. 21-22, q. 45-46; p. 25-26, q. 81-83; p. 26; p. 27-28; p. 38; p. 46; p. 48, q. 12; p. 52, q. 45; p. 59; p. 78-79, q. 10; p. 84, q. 13; p. 106, q. 28; p. 124, q. 2; p. 125, q. 3; p. 133; and p. 67, q. 12). The Honorable John P. Lair, a distinquished jurist, who controls his courtroom with a firm hand, stated that Mr. Getty had never been contemptuous or he would have been in jail. (T.C., Vol. VI, p. 493-494). He said there had never been an act of contempt in his Court by Mr. Getty. (T.C., Vol. VI, p. 503-504, q. 2-3).

Judge Lair also has a hearing disability. (T.C., Vol. VI, p. 495). However, he heard enough to say that Getty's conduct was not calculated to bring the

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bench and the bar into disrepute. (T.C., Vol. IV, p. 12, q. 5). This opinion that Getty was not abusive was concurred in by Joseph F. Connelly and William Hopkins, Carlisle, Nicholas County, attorneys, and by Beulah Hughes, Nicholas Circuit Court Clerk. (T.C., Vol. VIII, p. 730, 743, 746).

The Petitioner objected to the Court having disregarded and gone behind the unimpeached record. He stated that such procedure deprived him of due process.

Getty also pointed out to the Court of Appeals the many areas in the law in which it had refused to disturb the findings of an administrative hearing officer, of a fiscal court in a zoning matter, or of a trial judge, where the opinion of the Trier of Fact was supported by substantial evidence or was not clearly erroneous. He reminded the Court that this was especially true when the matter of credibility or weight must be determined.

The Petitioner respectfully suggested to the Court of Appeals that it would be unfair to afford the applicant for a liquor license the protection of having the testimony of opponents weighed in the light of their demeanor while testifying and to deny the same protection to any attorney. He asserted to the Court that it was not in a position, from having observed the witnesses, to determine whether or not the descriptive language used by them in regard to Mr. Getty, although true to them in their belief,

was chosen and used by them because of certain personal dislike or animosity.

The Court of Appeals could not have observed one of the attorneys from the Eighteenth Judicial District, who appeared on behalf of the Complainant against Mr. Getty, shaking his finger within three or four inches of the end of the nose of one of Mr. Getty's counsel, while at the same having a flushed countenance and speaking in a very forceful manner. It may have appeared to the members of the Trial Committee that his ire was directed at Mr. Getty's counsel. This was in fact not true, since he was discussing a third party, who had nothing to do with the hearings, and the witness was not in the slightest degree angered at counsel. The members of the Committee could not have failed to compare this gentleman's own vigorous behavior with his description of the events that had occurred between him and Mr. Getty.

These matters were brought to the Court's attention in support of Mr. Getty's argument that equal treatment under the law is a right to which attorneys as well as other citizens are entitled. Obviously, attorneys are being denied equal protection of the laws by the Court of Appeals of Kentucky if all other parties in both civil and criminal actions are entitled to have the credibility of witnesses determined by a Trier of Fact, who observes the witnesses, and an attorney is denied this right.

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The Petitioner also argued to the Court of Appeals in his Petition for Rehearing, since he had no notice prior to the opinion of the Court that it would be necessary for him to do so, that the delegation to the Court of Appeals in Kentucky Revised Statutes, Chapter 30, Appendix A, pp. 2a-3a, of the power to regulate the practice of law was a deprivation to him of due process and equal protection of the law under the Constitution of these United States of America. He maintained to the Court of Appeals that the statute contained no standards against which the conduct of an attorney might be measured to determine if he should be disciplined for improper behavior. Nor did it contain any safeguards to insure that attorneys undergoing disciplinary procedures would receive due process and equal protection under the law.

Finally in his Petition for Rehearing Mr. Getty attacked the imposition of all of the costs of the proceedings upon him as execssive and as depriving him of due process and equal protection of the law under the Constitution of these United States of America. He had made both written and oral motions for separation between the Kohler and the other charges. Several months before the Trial Committee hearings J. J. Varellas, an attorney, heard of Kohler's charges against Mr. Getty. He volunteered information that in December, 1970, before Getty returned from California to resume the practice of law in Kentucky and undertook Kohler's

representation, Kohler had told Varellas that he could not get a fair trial, on a non-support charge, from Judge Mitchell Meade because of difficulty over a young woman. The assertion that Getty had fabricated this story constitutes counts I and II of the charges made in the May 3, 1973, complaint. Mr. Varellas prepared an affidavit to such effect which was forwarded to the Kentucky State Bar Association, together with a request that the charges be reinvestigated and dismissed.

Mr. Getty had previously filed a number of affidavits of judges and lawyers to the effect that his reputation for veracity was good and Kohler's was bad. The requested reinvestigation was never made.

Mr. Getty also argued that to impose all the costs upon him was discriminatory. In *Kentucky State Bar Association* v. *Taylor*, Ky. 1972, 482 S.W. 2d 574, 574, the Court stated:

> "The Trial Committee was of course more familiar with the case than the Govenors of the Bar Association and we were favorably impressed by its analysis and recommendations. Since, however, the members of the Committee saw violations in some instances (such as counts seven and eight) where we hold there was none, it seems appropriate that the recommended disciplinary action be modified to scale. It is therefore our judgment that the Respondent be publically reprimanded and suspended from the

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> privilege of practicing law in this state for a period of six months.
>
> The foregoing disposition obviates consideration of Point 6 (that the recommended punishment is disproportionately great) and leaves only the question of costs. It is our judgment that fifty percent of the costs of the proceedings be taxed against the Respondent."

Prior to the rendering of the opinion of January 17, 1975, which found the Petitioner guilty on all four counts of the second charge and imposed a six months suspension from the practice of law upon him, he had no notice that the federal questions, not raised in his response, would be raised by the actions of the Court of Appeals. Therefore, his Petition for Rehearing was his first opportunity, as to these other issues, to bring his rights under the Constitution of the United States to the attention of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE SUBSTANTIAL QUESTION OF WHETHER AN ATTORNEY IS DEPRIVED OF DUE PROCESS OF LAW AND OF EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THESE UNITED STATES OF AMERICA WHEN A STATE COURT OF LAST RESORT, WITHOUT GIVING THE ACCUSED A HEARING BEFORE IT UPON THE CONTROVERTED MATTERS, SUBSTITUTES ITS OWN OPINION AS TO THE CREDIBILITY OF CONFLICTING WITNESSES, WHICH OPINION IS SOLELY BASED UPON A WRITTEN TRANSCRIPT, FOR THAT OF THE TRIER OF FACT AND SUSPENDS THE ATTORNEY FROM THE PRACTICE OF LAW.

A. The Court of Appeals has taken upon itself the functions of a Trial Judge in Bar disciplinary cases without having the personal observation of witnesses which protects the accused from prejudice.

Credibility is a quality or state of being worthy of belief or acceptance. Websters Third New International Dictionary, G. C. Merriam Company, Springfield, Massachusetts, 1966. It has been generally accepted that the tone of voice, the inflection, the complexion, whether flushed or not, the physical carriage, whether tensed or not, and other aspects of demeanor which are apparent to an observer are of great importance in assessing the truthfulness of a witness, his possible prejudice, or the weight to be given to his testimony.

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In discussing the Kohler charges in its opinion the Court of Appeals mentions with approval the application by the Trial Committee of the standards enunicated by it in the case of *In Re Hargis,* Ky. 1945, 190 S.W. 2d 333, 334-335, which was a disciplinary proceeding against an attorney. These standards were:

> "In general, the veracity of witnesses is to be determined by (1) their appearance on the stand, and their character insofar as their character bears upon the question of their probable willingness to lie; (2) the evidence or non-evidence of a motive for falsification; and (3) the collateral undisputed facts bearing upon the intrinsic probability of truth or falsehood of the testimony given."

It then proceeds to totally disregard its own admonition. Appendix B, pp. 20a-21a.

The Trial Committee did not have to disbelieve that the honorable men who appeared before it felt that they were telling the truth to acquit the Petitioner. The testimony against Getty consisted of value judgments. The charges are replete with the words "badgering", "harrassment", "loud and boisterous", and "abusive".

Loudness of voice, repetition without rephrasing, attitude and demeanor are characteristics and expressions of personality about which men can honestly differ. If a witness obviously has a strong

personal dislike for or personality clash with an individual about whose conduct he is stating a judgment then his opinion is likely to be influenced by his personal feelings. The voice of a person disliked may be considered to be loud or disrespectful simply because of the source from which it originates, rather than because its volume is actually great or its tone and inflection disparaging.

It should be noted that none of the judges or prosecuting attorneys in the three cases out of which the charges arose made any voluntary complaint to the Bar Association against Mr. Getty. Only one of the three judges, all of whom had spent many years upon the bench, charged Getty with contempt. The evidence would have justified the Trial Committee in believing that this one citation resulted from Getty's inexperience and his ineffectual attempts to rephrase his questions so that evidence favorable to his client might be adduced in an admissable manner.

B. The many inconsistencies in the testimony of the witnesses before the Trial Committee make personal observations especially necessary to a determination of credibility in this case.

Mr. John Keith denied that he had made any unpleasant remarks towards Mr. Getty on the day of the Campbell trial in Harrison County. (T.C., Vol. VI, p. 452, q. 39). He specifically denied

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making any remark to Mr. Getty about the latter having been run out of some place. (T.C., Vol. VI. p. 459, q. 22). Judge Carl Nunnelley, Harrison County Judge, stated that in the Harrison County Clerk's Office, prior to the trial, when he did not believe Mr. Getty had previously met Mr. Keith and he introduced them, Mr. Keith made a remark to Mr. Getty about being run out of some other place. (T.C., Vol. V, p. 383-384, q. 10).

Both Mr. Keith and Judge Nunnelley stated that when the trial commenced and a jury was selected Mr. Getty had objected to Mr. Keith's stating out loud that the Commonwealth accepted the first six jurors called, rather than returning a jury list to the Court. His grounds were that people who knew that Mr. Getty had struck them from the jury might be prejudiced against him or a future client at some time when they were recalled upon a panel. In this discussion, which took place out of court and out of the hearing of the jury, Mr. Keith and Judge Nunnelley both testified that Mr. Keith stated that this was the way they had always done it in the thirty-one years that he had been County Attorney. (T.C., Vol. V, p. 382-383, q. 7). Since Mr. Getty had never appeared in the Harrison County Court before it seemed somewhat odd that he would have called Mr. Keith a "damn liar" about something about which Mr. Getty could have had no knowledge. It is more reasonable that Mr. Getty called Mr. Keith a "damn liar" when Mr. Keith

said that Mr. Getty had been run out of Georgetown. (T.C., Vol. X, p. 901-902, q. 120-123).

Judge Nunnelley contradicted himself. He stated that he sustained an objection by the Commonwealth ". . . on one or two occasions . . ." (Getty, p. 23). He said that he had admonished Getty on one or more occasions and that ". . . if I had said thirty it would probably be ten or twenty short . . ." (Getty, p. 26). Later he testified ". . . it could have been thirty, it might have been twenty, it might have been fifteen . . ." (Getty, p. 31). He recited that only on one occasion did Mr. Getty's behavior amount to contempt. (Getty, p. 23-30). Judge Nunnelley stated at another time that Getty was admonished on three or four occasions in the morning that he was not following the rules of the Court. (T.C., p. 373). He said that the Petitioner was warned as to his possible contempt on one occasion in the morning and again in the afternoon. (T.C., p. 373-374).

Mr. Keith, although reversing their order from harrassing and haranguing to haranguing and harrassing, used the same words to describe Mr. Getty's conduct as had been used in the joint affidavit of Judge Nunnelley and Mr. Keith, prepared by Mr. Keith. (T.C., Vol. V, p. 375; p. 399, q. 28; p. 401, q. 33; Vol. VI, p. 446, q. 23). He also gave the impression that continuous objections were made by him to questions asked by Mr. Getty and that Mr. Getty continuously ignored the rulings

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of the Court sustaining such objections. (Getty, p. 44-45; p. 52-55). Judge Nunnelley stated that he had sustained Mr. Keith's objections twice prior to declaring a mistrial. (Getty, p. 28) Mr. Keith also stated that only on one occasion did Judge Nunnelley admonish Getty. (Getty, p. 46, q. 21).

Getty was attempting to question Trooper John E. Conley of the Kentucky State Police as to his qualifications to administer a breathalyzer test when the contempt was ruled. (T.C., Vol. V, p. 389, q. 25). Evidently the harrassing and harranguing was being repetitious and loud. (T.C., Vol. V, p. 375; p. 399, q. 28; p. 401, q. 33; Vol. VI, p. 451, q. 35; p. 456, q. 8-11). Judge Nunnelley has a hearing problem which requires attorneys to speak up. (T.C., p. 436-437, q. 1-2) The Harrison County Courtroom is 178 inches wide. (Getty, p. 35-36, Exhibit "A").

The Reverend Curtis Jones, a minister of the Kentucky Christain Conference, was present in the Courtroom. He did not consider Mr. Getty's conduct and demeanor toward Judge Nunnelley to be in any way disrespectful or contemptuous. (Getty, q. 134, q. 15-16). He testified that Mr. Getty gestured with his hands (T.C., Vol. VII, 564, q. 26), but that he did not think that Mr. Getty could have gotten within a foot of the Judge's face. (T.C., Vol. VII, p. 571, q. 42; p. 578-579, q. 1-3).

Reverend Jones' wife did not see Mr. Getty doing anything wrong. (T.C., Vol. VII, p. 621).

Neither did Ralph Beckett and Alex Coleman, both members of the jury in the Campbell trial. (Getty, p. 125, 126, 127, 129). Trial Committee Report, Appendix B, pp. 43a-44a.

Mr. Keith would frequently tell the witness that he did not have to answer a question asked by Mr. Getty. The latter would then ask Judge Nunnelley to let him rephrase the question. (T.C., Vol. VII, p. 562, q. 19; p. 583, q. 13-18). Judge Nunnelley testified that there was a lot of "hassling" between Getty and Keith (T.C., Vol. V, p. 374). He also described Keith as being vociferous. (T.C., Vol. V, p. 374). In spite of Mr. Keith's denial that he talked loud or bickered with Mr. Getty (T.C., Vol. VI, p. 459, q. 24-25), Judge Nunnelley said that Keith raised his voice to the Court, (T.C., Vol. V, p. 382, q. 5); that there was a lot of arguing back and forth between counsel (T.C., Vol. V, p. 405, q. 47-49); and that it was necessary for the Court to admonish Keith. (T.C., Vol. V, p. 405, q. 50).

Mr. Charles Cox, County Attorney of Nicholas County, stated in the affidavit solicited by the Bar Association that during the examining trial in *Commonwealth* vs. *Hilander* in the Nicholas County Court, Mr. Getty had pointed his finger in the face of Detective Charles Seay of the Kentucky State Police. He corrected this in his testimony by stating that in fact Seay was pointing his finger at Getty (T.C., Vol IX, p. 779), a fact which Seay admitted. (T.C., Vol. IX, p. 791, q. 11).

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The only other basis upon which the Court of Appeals could have found that Getty was abusive towards a witness during a recess would be the testimony of Officer Seay. For reasons that will become apparent, Mr. Getty did not want Detective Seay, at the conclusion of his testimony, to go into the room where the other witnesses were segregated. (T.C., Vol. IX, p. 799-780). He followed Seay to tell him that Judge Clark wanted him to return to the courtroom. (T.C., Vol. IX, p. 804, q. 8). Detective Seay is a somewhat violent man. He shook his finger at Mr. Getty who said that if Seay continued to do so he would bite it off. Officer Seay advised him that if he did it would be on the end of Officer Seay's fist as it went down Mr. Getty's throat. (T.C., Vol. IX, p. 791, q. 11; T.C., Vol. X, p. 931-935, q. 25; T.C., Vol. IX, p. 804-805, q. 8, p. 806-807, q. 16-21).

When Officer Seay had commenced to testify Mr. Getty had objected to any testimony by the Detective as to admissions made by the Defendant and as to evidence seized, upon the grounds that the interrogation and search were illegal. This motion to supress was overruled. (Hilander, p. 9-10). Officer Seay was then questioned by the Petitioner as to the manner of his interrogation of the Defendant, Hilander, and as to the search. He said that when he stopped Hilander and his companion, Sams, he advised them of their Mirandi Rights. (Hilander, p. 10).

Seay later said that he advised them of their rights at the Carlisle, Nicholas County, Police Station. (Hilander, p. 13). He refused Getty's request to check his records and report back to the Court Reporter when he had taken Hilander into custody. (Hilander, p. 12). Judge Floyd Clark, Judge of the Nicholas County Court, then ordered Seay to do so. (Hilander, p. 13). It appeared from the testimony of Officer Earl C. Finch that Hilander had been stopped about eleven o'clock in the morning. (Hilander, p. 43). Officer Seay had not placed him under arrest until 6 p.m. (Hilander, p. 14).

Officer Seay testified that Chief Earlywine of the Carlisle Police and two other officers were present when he advised Hilander of his rights. (Hilander, p. 10 and p. 15). Chief Earlywine said he was not present. (Hilander, p. 27).

Seay said that he was not familiar with Mirandi Warning Cards or Waiver Cards. (Hilander, p. 15). Officer Adams testified that Seay and Hilander signed a Waiver Card, (Hilander, p. 37), and that Seay read his rights off of a card. (Hilander, p. 42).

Chief Earlywine testified that Seay asked all the local officers to stay outside while he questioned Hilander. (Hilander, p. 35). Officer Adams stated that Detective Seay called him back in while he read Hilander's right to him. (Hilander, p. 36).

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Officer Fitch testified that Officer Seay read Hilander his rights in the hall when he was first brought in. (Hilander, p. 42). He also said that Seay read the Mirandi Warning to Hilander. (Hilander, p. 45).

Officer Seay is evidently a man of some temper. Besides his statements to the Petitioner, Chief Earlywine testified, when asked if Seay kicked Sams, that Seay had only kicked the table when he became displeased with something Sams had said. (Hilander, p. 34). It is obvious why the Petitioner did not want Detective Seay to go into the room where the segregated witnesses, who had not yet testified, were waiting.

Judge Clark felt that both attorneys had gotten emotional. (T.C., Vol. VIII, p. 751-753, q. 11). He described both attorneys as being loud. (T.C., Vol. VIII, p. 757, q. 24; p. 768, q. 19) He also described Mr. Cox as has having hammered on his desk during the course of the hearing. (T.C., Vol. VIII, p. 769, q. 27). He did not cite either attorney for contempt.

The Court of Appeals totally ignored the transcript of the Morgan trial and the testimony of the presiding Judge that Getty had not been in contempt. It found him guilty of being continually reprimanded by the Court for his arrogant, abusive attitude; of continually interrupting the Commonwealth's Attorney in the presentation of the

Commonwealth's case; and of refusing to listen to objections made by the Commonwealth's Attorney, in spite of the fact the record and the testimony of the Trial Judge show this not to be true and that the transcript of testimony at the Morgan trial had been stipulated into evidence before the Trial Committee by the Kentucky Bar Association.

Mr. G. L. Tucker, the Commonwealth Attorney for Harrison and Nicholas Counties, swore in his affidavit to the Bar Association that Getty was shaking Mr. Cox by the lapels during the noon adjournment of the Morgan trial when he intervened. (Compare T.C., Vol. VII, p. 590 and 599). Mr. Cox said that he had no memory of Mr. Getty touching him. (T.C., Vol. VII, p. 644, q. 18). At that time the Commonwealth Attorney had hit Getty with his shoulder and knocked him three or four feet. (T.C., Vol. X, p. 924-926).

Getty testified that he followed Cox and Tucker to the open door of Cox's office to tell Tucker not to shove him any more. Getty's testimony was verified by other witnesses. (T.C., Vol. VIII, p. 680, q. 19; p. 680-681, q. 22; p. 697-698; p. 706-707, q. 1-3; p. 682, q. 29).

In spite of the fact that he is contradicted by the transcript, the Commonwealth Attorney, called the Petitioner arrogant and abusive. (T.C., Vol. VII, p. 586, q. 5-6; p. 587, q. 13). Mr. Rubel Williams, the foreman of the jury in the Morgan trial, who

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had served on at least twenty juries in the Nicholas Circuit Court, testified that Mr. Tucker was as loud as Mr. Getty. (T.C., Vol. VIII, p. 668, q. 14); that the jury didn't think that Mr. Getty showed lack of respect for the Court (T.C., Vol. VIII, p. 669, q. 15); that Mr. Getty was not discourteous (T.C., Vol. VIII, p. 669, q. 16); and that the jury heard nothing of the difficulty at the noon recess (T.C., Vol. VIII, p. 675, q. 2-7).

The transcript of testimony in the Morgan case stipulated into evidence by the Kentucky Bar Association and by the Respondent, was not impeached and is the best evidence of what occurred during the trial. To disregard it and go behind the unimpeached record deprived the Petitioner of due process.

C. The Court of Appeals of Kentucky has not conformed to the rulings of this Court, and of many others, that disbarment proceedings are quasi-criminal in nature.

The Court of Appeals continues to state that disbarment is a civil action. Much of its reasoning is based on its conclusion that criminal safeguards are not needed in these civil matters. *Commonwealth Ex Rel Buckingham* v. *Ward,* 267 Ky. 627, 103 S.W. 2d 117 (1937); *Louisville Bar Association* v. *Hubbard,* 282 Ky. 734, 139 S.W. 2d 773 (1940).

As early as 1868, in *Ex parte Bradley,* 74 U.S. 364 (7 Wall. 364) 19 L. Ed. 214, this Court held that in disbarment proceedings attorneys may not be punished for offenses not specified in a rule to show cause. In *Ex parte Robinson,* 86 U.S. 505 (19 Wall. 505) 22 L. Ed. 205 (1873), it was ruled that an attorney is entitled to notice of the grounds of the complaint and the opportunity to be heard before being disbarred.

More recently this Court reaffirmed its earlier decisions that an attorney is entitled to procedural due process, including fair notice of the charge and the opportunity for explanation and defense. It stated that disbarment proceedings are quasi-criminal in nature and referred to In re: *Gault,* 387 U.S. 1, 33. In re *Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 2L. Ed. 2d 117, reh. denied 390 U.S. 961, 88 S. Ct. 1833, 20 L. Ed 2d 874 (1968). *Spevack* v. *Cline,* 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) held that the refusal of an attorney to produce demanded financial records or to testify in a judicial inquiry on the basis that the records and testimony world tend to incriminate him was not grounds for disbarment.

State statutes which infringe upon constitutional rights under the guise of regulation were condemned in *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405, 418 (1963), where the Court said that the objectionable quality

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of vagueness and overbreadth does not depend upon the absence of fair notice to one accused of a crime or upon unchannelled delegation of legislative powers, but on the danger of tolerating a penal statute susceptible of sweeping or improper application in the area of First Amendment freedom. *Polk* v. *State Bar of Texas,* 374 Fed. Supp. 784, (N.D. Texas 1974), rev. on other grounds 480 F. 2d 998 (5th Cir. 1975), held that a private citizen does not give up his right to freedom of expression when he becomes a licensed attorney. It said at page 788 "where the protections of the Constitution conflict with the efficiency of a system to insure professional conduct, it is the Constitution that must prevail and the system that must be modified to conform."

Many states now consider disciplinary actions, while not fully criminal in character, to be "penal proceedings", the results of which may permanently cripple an attorney's standing and reputation in the community. *Florida Bar* v. *Quick,* Fla. 1973, 279 So. 2d 4. It is accepted that "the right to practice law (implemented through a license) is a constitutionally protected right and no attorney can be deprived of this right by suspension or otherwise without strict adherence to basic constitutional principals of procedural due process." *Louisiana State Bar Association* v. *Ehmig,* La. 1973, 277 So. 2d 137.

Some states also disagree with the Court of Appeals of Kentucky that a mere preponderance of

the evidence is sufficient to find an attorney guilty of unprofessional conduct and subject to discipline. They hold that the clear and convincing evidence necessary to sustain a referee's finding of guilty is more than the mere preponderance of the evidence sufficient for a civil action, although not as stringent as required in criminal actions. *Florida Bar* v. *Quick*, Fla. 1973, 279 So. 2d 4.

Other courts of last resort have not attempted to usurp the functions of the Trier of Fact where the credence to be given to the testimony of a witness is an issue in a disciplinary proceeding. They hold that the reviewing court must give great weight to the Committee's findings in view of its ability to judge credibility. *Poll* v. *State Bar of California*, Calif. 1974, 528 P. 2d 35; *Bluestein* v. *State Bar of California*, Calif. 1975, 529 P. 2d 599; In re: *Hallett*, Ill. 1974, 319 N.E. 2d 48; In re: *Clay*, S. Car. 1974, 209 S.E. 2d 561.

The Kentucky Court of Appeals denies attorneys the equal protection of the law extended to all other citizens in administrative proceedings, to a party in a child custody case, and in all other areas of the law. It deems itself more fit to determine the credibility of witnesses, or their possible prejudice, from the written page than a panel of distinguished attorneys who heard forty-two witnesses produce one thousand forty-seven pages of testimony over a three day period. Other courts, in resolving a

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conflict in testimony in disciplinary proceedings, give the hearing court's findings in support of its recommendations the same force and effect as those contained in a master's report in equity. They are considered to be prima facie correct and will not be disturbed unless determined to be clearly erroneous, not supported by substantial evidence, or arbitrary and capricious. *Bar Association of Baltimore* v. *Marshall,* Md. 1973, 307 A. 2d 677; In re: *Estes,* Mich. 1973, 212 M.W. 2d 903; In re: *Johnston,* Wash. 1974, 524 P. 2d 593; In re: *Clay,* S. Car. 1974, 209 S.E. 2d 561; In re: *Bowen,* Idaho 1973, 508 P. 2d 1240.

The Trial Committee found from the testimony before it that it was evident that the attorneys were emotionally involved during the Morgan trial. They further found it to be evident that these strong feelings carried over during the noon recess. Appendix B, p. 44a. Certainly feelings between the parties which might have created prejudice or colored their testimony would have been more evident to the Trial Committee than to the Court of Appeals proceeding from a written record.

The Trial Committee could also have easily become aware from the atmosphere during the hearing that among public officials who have long held office in a county or district a certain clanishness or self-supportive relationship often develops. All of the charges of which the Court of

Appeals found Mr. Getty guilty arose out of two counties of one judicial district.

A Circuit Judge, a County Judge, a Police Judge, two County Attorneys, and a number of members of the Bar appeared to testify as to Mr. Getty's veracity and as to his ordinary and customary demeanor in the Courts of the Fourteenth Judicial District where he regularly practices. Others appeared but were not allowed to testify after the Trial Committee determined that it was not going to hear any further evidence with regard to Mr. Getty's general behavior in Court.

Observing the testimony of the witnesses the Trial Committee could have become aware of passion and prejudice which might not have been evident to the Court of Appeals in weighing the testimony against Mr. Getty. One witness testified that when Getty went to see Mr. Keith to apologize if he had offended him, and to repeat his offer to apologize to Judge Nunnelley, if Judge Nunnelley had thought that he had shown him disrespect, that Mr. Keith was cursing when talking to Mr. Getty, told him that he had taken up too much time in the Campbell case, and for Getty not to get smart or he would knock his block off. The witness described Mr. Keith's behavior as "pretty rough". (T.C., Vol. VIII, p. 717-718)

D. The Board of Governors and the Court of Appeals at no time afforded the Petitioner an opportunity to be heard before either of them upon the merits of the controversy which the Court of Appeals asserts it alone had the power to determine.

Pursuant to the Rules of the Court of Appeals, R.C.A. 3.230, Appendix A, p. 5a, the Trial Committee was appointed to hear the evidence upon the charges against Petitioner and to report their Findings of Fact, Conclusions of Law and Recommendations to the Board of Governors. R.C.A. 3.360, Appendix A, pp. 7a-8a.

The Trial Committee heard the cause and filed their Findings of Fact, Conclusions of Law and Recommendations with the Board of Governors. These were that the charges against the Petitioner were not supported by a preponderance of the evidence and should be dismissed.

Without giving Mr. Getty an opportunity to be heard and, presumably reviewing the 2,675 pages of evidence in the record, as well as other matters, in a two day meeting, the Board of Governors found him guilty of part of Count one of Charge II and recommended a one month suspension. This was without argument, without a hearing, without affording the Petitioner an opportunity to be heard, and without stating any reason to the Petitioner for rejecting the finding of acquittal made by the Trial

Committee. Therefore, when the show cause order was issued by the Court of Appeals, the Petitioner had no explanation given to him of why the Board of Governors differed with the Trial Committee. Naturally, he only responded to the unsupported finding of the Board of Governors.

Without notice to Mr. Getty that it intended to go into matters not raised by the recommendation of the Board of Governors, and without giving him the opportunity to present argument or be heard, the Court of Appelas resurrected charges on which he had been acquitted by both the Trial Committee and the Board of Governors and found him guilty thereon. The first opportunity that he had to answer was in his Petition for Rehearing which was summarily denied without explanation. This is in spite of the fact that the opinion misquoted the finding and recommendation of the Board of Governors, ignored the transcript of the Morgan trial and ignored the transcript of the Hilander trial.

The opinion of the Court states in part "The Board of Governors considered the Trial Committee's report, reviewed the record and recommended to this Court a finding of not guilty on all counts except count one of the second charge. On that count, the Board of Governors recommended a finding of guilt and stated:. . ." Then follows a word for word recitation of the charge. The Board of Governors had not so stated but had merely set forth that it

adjudged him guilty on the second complaint filed August 2, 1973, ". . . With the exception that the Board of Governors concurred with the Trial Committee that the facts alleged in Paragraphs II, III, and IV, and the first literary sentence in Paragraph I of the August 2, 1973, charge are not sustained by the evidence . . ." Appendix B, pp. 29a, 31a.

The first sentence of Paragraph I of the August 2, 1973, charge includes the recitation that Getty called John M. Keith a "damn liar" on two occasions. The opinion of the Court, including a repetition of this statement, was reported at length in newspapers, in Paris, Kentucky, the county seat of Bourbon County, where Getty resides, and in the Lexington papers, which receive distribution throughout most of the State of Kentucky. It was also quoted in an editorial in the Kentucky Bar Journal. Appendix B, pp. 10a-11a.

Although these errors were pointed out to the Court of Appeals in Getty's Petition for Rehearing no revision of the opinion was made. The only revision which took place was the issuance of a "corrected copy" of the mandate of April 28, 1975, which was issued on May 6, 1975. It raised the suspension from one month to six months.

There is no question that the power to disbar or suspend resided in the Court of Appeals as a court, was not delegated and could not be delegated.

K.R.S. 30.170. Appendix A, pp. 2a-3a, 7a-9a. The hearings before the Trial Committee were not hearings before the Court. The arguments presented to the Trial Committee were concerned with what their findings and recommendations should be, and not with what the ultimate disposition of the cause by the Court should be.

The proceedings subsequent to the recommendation of the Board of Governors were directed to responding solely thereto. The brief filed in connection with the show cause order could not properly be regarded as the equivalent of a hearing by the Court of Appeals upon the merits prior to the entry of judgment.

In no sense did the Court of Appeals ever have the merits of the cause before it until Getty's Petition for Rehearing was filed with it. ". . . It is apparent that that Court at no time afforded the Petitioner 'an opportunity to be heard before it upon the merits of the controversy which it alone had power to determine.' " In re: *Noell,* 8th Cir. 1937, 92d F. 2d 5, 7.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE SUBSTANTIAL QUESTION OF WHETHER KENTUCKY REVISED STATUTES 30.170, GRANTING THE COURT OF APPEALS THE AUTHORITY TO REGULATE THE PRACTICE OF LAW, IS SO LACKING IN ANY STANDARDS OR PROCEDURAL SAFEGUARDS AS TO MAKE ITS EFFECTS SO UNCERTAIN AS TO DENY ATTORNEYS DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THESE UNITED STATES OF AMERICA, AS WELL AS PERMITTING THE COURT OF APPEALS TO ENACT RULES SUSCEPTIBLE OF SWEEPING AND IMPROPER APPLICATION LIMITING FIRST AMENDMENT FREEDOMS.

Kentucky Revised Statute 30.170 (1) (c) gives the Court of Appeals authority to adopt and promulgate laws "c. Establishing practice and procedure for disciplining, suspending and disbarring attorneys;". It further provides "(2) The rules of court adopted and promulgated under this section shall supersede all laws or parts of law in conflict therewith, to the extent of the conflict." Appendix A, pp. 2a-3a.

Pursuant to this authority the Court has promulgated R.C.A. 3.130 which states: "The Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standard of Professional Conduct required of the members of the Bar, and the Board may cause to be tried all

charges brought under this Code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.." Appendix A, 3a-4a.

Pursuant to the authority of K.R.S. 30.170 and an alleged inherent power to discipline the legal profession the Court of Appeals has claimed for itself the right to determine the credibility of witnesses, without hearing or observing those witnesses, the right to disregard the Findings of Fact and Conclusions of Law of the Trier of Fact, and the right to re-institute charges of which an accused attorney considers himself to have been acquitted, without notice to the attorney or affording him a hearing before it upon the merits. Mr. Justice Black has probably stated most succinctly the guiding principle which should be adopted by all courts of last resort when he said ". . . Those who commit offenses against courts should be no less entitled to the Bill of Rights than those who commit offenses against the public in general." *Frank* v. *United States,* 395 U.S., 147, 160, 89 S. Ct. 1503, 23 L. Ed. 2d 162, reh. denied 396 U.S. 869, 90 S. Ct. 34, 24 L. Ed. 2d 123.

It has been held that a private citizen does not give up his right to freedom of expression when he becomes a licensed attorney. State Bar action against an attorney for comments to the news media critical of a judge would violate his First Amendment rights in his capacity as a private

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citizen. *Volk* v. *State Bar of Texas,* N.D. Texas 1974, Fed. Supp. 784, 788. Attorneys have constitutional rights under the First and Fourtheenth Amendments. *N.A.A.C.P.* v. *Button,* 371 U.S. 414, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) They are also private citizens who have the right to make a fair comment on public officials. *New York Times* v. *Sullivan,* 376 U.S. 254, 277, 84 S. Ct. 710, 11 L. Ed. 686, 704.

The Court of Appeals believes that some statements, such as Getty calling Keith a "damn liar" out of the courtroom, would bring the bench and bar into disrepute under R.C.A. 3.130, regardless of the reason why they were made. Such statements are constitutionally protected speech under the First and Fourtheenth Amendments. Therefore, R.C.A. 3.130 and the statute authorizing it are constitutionally overbroad and invalid on their face. As was said in *N.A.A.C.P.* v. *Button,* U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405, 418 (1963): "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application."

III. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE SUBSTANTIAL QUESTION OF WHETHER THE SUSPENSION OF THE PETITIONER WAS SO LACKING OF A RATIONAL BASIS IN THE EVIDENCE AS TO BE ARBITRARY AND DISCRIMINATORY AND THUS A DENIAL TO HIM OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

The Trial Committee participated extensively in the hearing. The members conducted their own examination of the witnesses, in addition to that undertaken by counsel for the parties. They were thus able to determine for themselves any prejudice which might have affected the opinions of the witnesses for the Kentucky Bar Association.

The Trial Committee noted that neither Judge John P. Lair or Judge Floyd Clark had cited Getty for contempt in the Morgan and Hilander cases, respectively. Neither they nor Judge Nunnelley had instituted charges against him with the Bar Association. Nor had Mr. John Keith, Mr. Charles Cox, or Mr. G. L. Tucker. Appendix B, pp. 42a, 45a, 47a.

The Trial Committee found the evidence to be conflicting; that during some of the alleged incidents all parties were emotionally involved; that neither Judge Lair nor Judge Clark felt that Getty's courtroom conduct warranted contempt action and that at least one informed, disinterested layman believed that Mr. Getty conducted himself in Court just as an attorney should. In summary the Trial

Committee, all experienced trial attorneys, did not believe that Getty's conduct was calculated to bring the bench or bar into disrepute; that Getty is a very persistent individual and one who is not afraid to "rock the boat" if he believes it is in the best interest of his client; that most of the allegations made against Getty were not supported by a preponderance of the evidence; that the evidence pertaining to some charges was extremely contradictory; and that the best evidence of what transpired in the Morgan and Hilander hearings was the transcript of testimony of those hearings.

This Court has held that suspension of an attorney is a denial of due process and equal protection of the laws because such suspension is both arbitrary and discriminatory unless there is evidence in the record which rationally supports the holding. *Konigsberg*, v. *State Bar of California*, 353 U.S. 252, 262, 77 S. Ct. 722, 1 L. Ed. 2d 810, 819 (1957) It cannot be said that the Court of Appeals in ignoring the transcript of evidence of the Hilander and Morgan trials, the recommendations of the Trial Committee which had the witnesses under close scrutiny for three days, the contradictions in the testimony of the individual witnesses, or between their testimony and their affidavits, the impeachment of County Attorney John M. Keith by Judge Carl Nunnelley, the impeachment of Commonwealth Attorney G. L. Tucker by County Attorney Charles Cox, the impeachment of Detective

Seay by several members of the Carlisle Police Force, the impeachment of many of the witnesses for the Kentucky Bar Association by members of the juries sitting in the trials or laymen present in the courtroom, the fact that three members of the Board of Governors voted to convict Getty on the Kohler charges when the Trial Committee did not believe him and the Court of Appeals itself found them "incredible", and the fact that a Circuit Judge, a County Judge, two County Attorneys, a Police Judge, and numerous members of the Bar from Getty's home district appeared to testify in his behalf, found a rational basis for its conclusion in the testimony of a small group of men, practically all public officials used to working together over a period of years, and coming from two adjoining counties.

In a case concerning whether or not this Court should disbar an attorney before it on the basis of a state court action this Court enunciated a principle which should be applied in reviewing whether or not attorneys have received due process in disciplinary proceedings. It stated in part ". . .2, That there was such an infirmity of proof as to facts found to have established the want of a fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion of that subject; . . ." *Selling* v. *Radford*, 243 U.S. 46, 37 S. Ct. 377, 61 L. Ed. 585 (1917).

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IV. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE SUBSTANTIAL QUESTION OF WHETHER THE IMPOSITION OF ALL THE COSTS OF A DISCIPLINARY PROCEEDING, AMOUNTING TO OVER TWO THOUSAND DOLLARS, UPON AN ATTORNEY ACQUITTED OF ALL CHARGES BY THE TRIER OF FACT, FOUND INNOCENT OF NINE OUT OF TEN CHARGES BY THE BOARD OF GOVERNORS OF THE BAR ASSOCIATION, AND FOUND INNOCENT OF SIX OUT OF TEN CHARGES BY THE COURT OF LAST RESORT, DEPRIVES HIM OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW.

The Petitioner's motions for a separation between the Kohler and the other charges should have been sustained in view of Kohler's status as convicted felon and the affidavit of James J. Varellas, an attorney at law, that Kohler had made the same remarks to him, which Getty was accused of fabricating, at a time before Getty returned to Kentucky from California. The Kentucky Bar Association did not even make a new investigation of Kohler's charges after the affidavit of Mr. Varellas was filed with it.

In his response to the show cause order the Petitioner requested an allocation of the costs. On page fourteen of its brief the Kentucky Bar Association stated as a basis for imposing all of the costs upon Getty "ramifications into the economic structure of the Bar Association".

The Court of Appeals sustained this payment in spite of the fact that it denied equal protection of the law to the Petitioner. Previously the Court of Appeals had ruled that recommended disciplinary actions be modified to scale. In a case where the accused was not found guilty upon all counts it ordered that he be taxed with only fifty percent of the costs of the proceedings. *Kentucky State Bar Association* v. *Taylor,* Ky. 1972, 482 S.W. 2d 574, 584.

CONCLUSION

The Trial Committee in its opinion, Appendix B, p. 44a, stated that it was quite common for attorneys to become emotionally involved in their cases "The trial of any case, and especially a criminal case, is an adversary hearing. The friction generated in the area of battle usually does not cool at the courtroom door."

The Court of Appeals has recognized this fact itself. Chief Justice Palmore speaking of lawyers as fighters in the pit of police and criminal courts made a sound recommendation. "But when the rules are loosely couched in terms of high principals, as are the Canons, there is room for difference of opinion, hence the distinct possibility that they do not provide sufficiently explicit 'no trespassing' signs for those who may approach the invisible line of proscription. For this reason, if no other, simple

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justice dictates that at arriving at a final determination all doubts be resolved in favor of the Respondent." *Kentucky State Bar Association* v. *Taylor,* Ky. 1972, 482 S.W. 2d 574, 582-583.

It may be impossible to construct a uniform code of conduct to be observed in the many jurisdictions within this nation. However, in an era when many lawyers pass from the courts of one jurisdiction to those of another on a regular basis, it is extremely important that they know, in order that the vigorous representation to which their clients are entitled will not be muted, that if they should run afoul of a local clique, or an antagonistic judge, that they will receive due process of the law and equal protection of the law in regard to any charges that may be brought against them.

For the reasons set forth herein a Writ of Certiorari should be granted to review the Judgment of the Court of Appeals of Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was served upon the Respondent by mailing post paid a true and correct copy thereof to the Honorable Ed W. Hancock, Attorney General of the Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky, 40601, and to the Honorable Leslie Whitmer, Director, Kentucky Bar Association, 243 State Capitol Building, Frankfort, Kentucky, 40601, and the Honorable Harris C. Rhodes, 907 Lancaster Street, Stanford, Kentucky, 40484, Attorneys for the Kentucky Bar Association, this the 21st day of July, 1975.

Raymond Francis Connell

Raymond Francis Connell